

Local 714, International Union of Operating Engineers, and International Union of Operating Engineers (Contractors Foundation Drilling Company) and Leonard G. Turman. Cases 16-CB-1758 and 16-CB-1759

July 22, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS FANNING AND ZIMMERMAN

On January 11, 1982, Administrative Law Judge Donald R. Holley issued the attached Decision in this proceeding. Thereafter, all parties filed exceptions and supporting briefs, and the Charging Party also filed a response to exceptions filed by Respondents.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings, and conclusions¹ of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

The General Counsel and the Charging Party except to the Administrative Law Judge's failure to afford certain relief to Charging Party Turman by entering an order against his home local, Local 819 of the International Union of Operating Engineers. Local 819 is not a party to this proceeding, it has not received formal notice of it nor participated in it, and the General Counsel did not move to amend its complaint to name Local 819 as a respondent. We therefore will not enter an order against Local 819. See *Laborers International Union of North America, Local 324 (Centex Homes of California, Incorporated)*, 234 NLRB 367, fn. 3 (1978); *Local 14055, United Steelworkers of America, AFL-CIO (Dow Chemical Company)*, 229 NLRB 302 (1977).

The General Counsel requests, in the alternative, an order requiring Respondents to reimburse Turman for his expenses in being reinstated to membership in good standing in Local 819; we find merit in this request. The Administrative Law Judge found that Local 819 did not accept Turman's tendered dues for the month of February 1980. The record also shows, and we find, that Local 714 notified Local 819, by letter dated September 12, 1979, of the fine against Turman and

asked Local 819, "please do not accept dues from Brother Turman until his fine is paid," and that Local 819 refunded to Turman the dues he had already paid for the months of November and December 1979, and January 1980. The General Counsel asserts that Turman has been suspended from membership in Local 819, and that to be reinstated he must pay his back dues and a reinstatement fee. These facts do not appear in the record, and we do not find them, but they may properly be proved in the compliance stage of this proceeding. We will therefore enter a general make-whole order against Respondents, leaving to compliance the determination of the nature and extent of Turman's losses as a consequence of Respondents' discrimination against him. We note, though, that those losses would properly include any dues that Turman may have to pay for any period during which he was suspended or expelled from membership, in order to secure reinstatement, except to the extent that such dues are allocable to insurance premiums, pension contributions, and like payments for benefits which will be reinstated to him retroactive to the date of his suspension. To the extent that such benefits cannot be reinstated retroactively, the value of those benefits, less the amount of Turman's contributions not made, are part of his losses. See *Local 418, Sheet Metal Workers (Young Plumbing & Supply, Inc.)*, 227 NLRB 300 (1976).² We shall also require Respondents to notify Local 819 of the terms of this Order and their compliance with it, and to retract Respondent Local 714's previous request that Local 819 not accept Turman's dues; moreover, if as a result of the discrimination against him Turman is not a member in good standing of Local 819 at the time of this Order, Respondents shall affirmatively request that Local 819 reinstate him to such status.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Re-

¹ Member Fanning finds it unnecessary to rely on *Local Union No. 153, International Brotherhood of Electrical Workers (Belleville Electric and Heating Inc.)*, 221 NLRB 345 (1975), in which he did not participate. See his dissenting opinion in *Carpenters District Council of Southern Colorado and its Local Union 362 (Pace Construction Co.)*, 222 NLRB 613 (1976).

² If as a result of interruption of such employee benefits Turman has incurred out-of-pocket expenses, he shall be compensated with interest calculated in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). With respect to delinquent contributions themselves, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments, because the provisions of employee benefit fund agreements are variable and complex. *Merryweather Optical Company*, 240 NLRB 1213, 1216, fn. 7 (1979). We leave to the compliance stage the question of whether Respondents must pay any additional amounts into various benefit funds in order to satisfy our make-whole remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the fund and, if there are no governing provisions, by evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but no collateral losses.

lations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that Respondents, Local 714, International Union of Operating Engineers and International Union of Operating Engineers, their officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Rescind and expunge from the records the \$500 fine levied against Leonard G. Turman for working behind a Local 714 picket line for a neutral employer."

2. Insert the following as paragraphs 2(b) and (c), and reletter the subsequent paragraphs accordingly:

"(b) Make Leonard G. Turman whole for any losses he may have suffered as a consequence of their discrimination against him.

"(c) Notify Local 819, International Union of Operating Engineers, of the terms of this Order, and their compliance with it, retract Local 714's previous request that Local 819 not accept dues from Leonard G. Turman, and affirmatively request that Local 819 reinstate Leonard G. Turman as a member in good standing, if as a result of the discrimination against him he is not a member in good standing at the time of the Board's Order."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT fine or affirm the fine of members for working behind our picket line for neutral employers at common situs construction sites.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL rescind and expunge from the records the \$500 fine levied against Leonard G. Turman for working behind a Local 714 picket line for a neutral employer.

WE WILL make Leonard G. Turman whole for any losses he may have suffered as a consequence of our discrimination against him.

WE WILL notify Local 819 of the terms of this order and our compliance with it and we will retract our previous request that Local 819 not accept dues from Leonard G. Turman.

If, as a result of our discrimination against him, Leonard G. Turman is not now a member in good standing of Local 819, WE WILL request Local 819 to reinstate him, and WE WILL reimburse Leonard G. Turman for any reinstatement fees or back dues he is required to pay, and WE WILL make him whole for any insurance, pension, or like benefits he may have lost as a result of our discrimination against him.

LOCAL 714, INTERNATIONAL UNION
OF OPERATING ENGINEERS

INTERNATIONAL UNION OF OPERATING
ENGINEERS

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge: Upon original charges filed in Cases 16-CB-1758 and 16-CB-1759 by Robert Elder, Esquire, attorney for Leonard Turman on October 8, 1980, against Local 714, International Brotherhood of Operating Engineers, and International Brotherhood of Operating Engineers, respectively (herein referred to as Local 714 and the International and/or collectively called Respondents), the Acting Regional Director for Region 16 of the National Labor Relations Board (herein called the Board) issued order consolidating cases and consolidated complaint and notice of hearing on November 18, 1980, alleging, *inter alia*, that Local 714 violated Section 8(b)(1)(A) of the National Labor Relations Act (herein called the Act) on September 11, 1979, by fining Turman \$500 for working behind its picket line and that the International violated Section 8(b)(1)(A) of the Act on September 17, 1980, by sustaining the above-described action of Local 714.¹ Respondents filed timely answers denying that they had engaged in the unfair labor practices alleged in the complaint.

The case was heard before me in Dallas, Texas, on July 28, 1981. All parties appeared and were afforded full opportunity to participate, to introduce and to meet material evidence, and to engage in oral argument. Counsel, including Turman's attorney, filed post-hearing briefs which have been carefully considered. Upon the entire record, the briefs, and arguments, and from my observation of the witnesses, I make the following:

¹ Par. 8 of the complaint was amended at the hearing to allege:

On or about September 11, 1979, Respondent's Local 714 levied a \$500. fine against Turman for working behind its picket lines and/or crossing a picket line described above in Paragraph 7, notwithstanding that the Union had no dispute with Turman's employer, and that at all times material herein Turman entered a job site through an established separate gate which was not being picketed.

Respondent Local 714 filed an amended answer denying the allegation. See ALJ Exh. 1.

FINDINGS OF FACT

I. JURISDICTION

It is uncontested, and I find, that Contractors Foundation Drilling Company (herein called Contractors Foundation) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. STATUS OF LABOR ORGANIZATIONS

It is admitted, and I find, that Local 714 and the International are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

In January 1979, Robert McKee, Inc. (herein called McKee), a general contractor engaged in the building and construction industry, commenced construction of a building complex for Texas Instruments on its 125-acre tract located in Dallas, Texas. At some unstated time, McKee subcontracted certain drilling work at the site to Contractors Foundation and certain excavating work to B & J Excavating Company (herein called B & J). On March 2, 1979, Local 714 commenced to picket B & J at the Texas Instruments jobsite. The picket sign protested the failure of B & J to abide by area standard wages and benefits.

After picketing began at the site, McKee created two gates at the jobsite—one for the exclusive use of B & J employees and suppliers and the other for the exclusive use of all other contractors, their employees, and suppliers.

On April 6, 1979, Turman, a driller employed by Contractors Foundation, commenced work on the Texas Instruments jobsite for his employer. It is undisputed that from April 6, 1979, until picketing at the site ceased, Local 714 picketed only the B & J gate. Turman testified without contradiction that he uniformly entered and left the jobsite through the so-called McKee gate which was reserved for the use of all but the employees and suppliers of B & J. While he was a member of Local 819 International Union of Operating Engineers (herein called Local 819), and was admittedly aware some 4 hours after he started work at the site that Local 714 was engaged in standards picketing directed at B & J, Turman continued to work at the site. As Local 714 did not picket at the McKee gate while Turman was on the site, Turman did not cross any picket line to enter or leave the site.

On May 9, 1979, W. W. Hale, a member of Local 714, filed charges with Local 714, alleging, in essence, that Turman had, by operating a drilling rig behind an Operating Engineers picket on the Texas Instruments job on April 16, 1979, been guilty of breaking down working conditions and violating his obligations to the International.² When notified of the charge, Turman replied by letter stating,³ *inter alia*, "I did not cross a Picket Line

set up for B & J Excavating Co. I as all other crafts entered the Job Site through a Gate set up for Robert E. McKee and all Sub-Contractors concerned."

Turman's trial before Local 714 was held at the Union's regular membership meeting on September 11, 1979. Turman appeared and pleaded guilty to working behind Local 714's picket line at the Texas Instruments jobsite. Local 714 found Turman "guilty as charged" and its president, Neil Haynes, informed him at the meeting that his fine would be \$500. Thereafter, by letter dated September 12, 1979, Local 714 notified Local 819, Turman's home local, that Turman "pled guilty as charged and was fined \$500.00."⁴

Although the record reveals that Operating Engineers local unions are not supposed to accept dues from members who have been fined until the fine is paid, Local 819 accepted Turman's proffer of dues for the months of November and December 1979 and January 1980. According to Turman, he went to Local 819's hall on February 25, 1980, and attempted to pay his union dues. The Local refused to accept his dues because he had not paid the fine levied against him by Local 714.

On February 27, 1980, Turman protested Local 714's decision by filing an appeal with the International. While Turman's appeal was not filed within 30 days of Local 714's decision to fine him and he did not pay the \$500 fine before the appealing as required by the International's constitution,⁵ the International processed his appeal. On September 30, 1980, the general secretary-treasurer of the International notified Turman and Local 714 that Turman's appeal was denied.⁶

B. Analysis and Conclusions

Respondents' claim that Section 10(b) of the Act precludes the Board from finding a violation on the facts outlined above presents a threshold issue which should be resolved before the merits are discussed. For the reasons set forth below, I find Section 10(b) is not applicable as claimed.

Respondents argue that the 10(b) period in this case should have started to run on September 11, 1979, when Turman was informed he was fined \$500. In the alternative, they claim that, at the latest, the period should have begun to run on February 25, 1980, when Local 819 re-

² See Resp. Intl. Exh. 1(a), p. 8.

³ See Resp. Local's Exh. 1, art. XVII, sec. 1(a). See also art. XVII, sec. 4, which states:

All Court Actions Superseded Art. XVII. No suit or other action at law or equity Section 4. shall be brought in any court and no proceeding shall be initiated before any administrative agency by any member, officer or subdivision of the International Union of Operating Engineers until and unless all rights, remedies and reasonable provisions for hearing, trial and appeal within the Organization shall have been properly followed and exhausted by the member, officer or subdivision complaining. This provision shall only require resort to internal remedies for a period not exceeding four (4) months. Any member violating this provision, shall, in addition, to the penalties prescribed in the Constitution and Ritual, be subject to a fine equal to the full amount of the costs incurred in the defense of any such action by the Union, together with such costs additional as the court may fix or assess against said member.

⁶ See Resp. Intl. Exhs. 1(m) and (n).

² See Resp. Intl. Exh. 1(a), p. 6.

³ See Resp. Intl. Exh. 1(a), p. 7.

fused to accept further dues from Turman until he paid the fine levied against him.

In *International Brotherhood of Electrical Workers, AFL-CIO, Local Union 716 (Fisk Electrical Company)*, 203 NLRB 333 (1973),⁷ the Board considered the precise issue posed in the instant case. There a union member filed a charge with the Board more than 6 months after the local union fined him, but within 6 months of the time that the international union acted on his appeal of the local union's decision. The Board there stated, *inter alia* (at 336):

We find that this case comes under the principle announced in *Pacific Telephone and Telegraph Company*, 188 NLRB 433, that, where the union's appellate procedure of review is a "procedural step necessary to establish with finality the propriety of the fines themselves," such review will form the basis for a separate cause of action if it occurs within the 10(b) period. Here, the fines levied against Vestal did not become final until the IVP acted on appeal and Vestal took no further appeals. . . . Since the IVP's appellate actions were proceedings to test the propriety of the disciplines imposed on Vestal by Respondent and, if proper, to give such disciplines finality or, if improper, to modify or revoke them, we find that his decisions on review started 10(b) running from December 20 and 22, respectively, which represent the dates of Respondent's final action against Vestal, and hence, the charge was timely filed.

Respondents in the case *sub judice* do not dispute the fact that Turman's appeal to the general executive board of the International was a procedural step necessary to establish with finality the propriety of Local 714's decision to fine Turman \$500. They do observe, without really arguing that it had any effect on the commencement of the running of the 10(b) period, that Turman failed to satisfy the constitutional requirements that he pay the fine levied against him and commence his appeal within 30 days of the local union's action. Since the International decided to consider Turman's appeal despite his failure to satisfy such requirements, I find the requirements were waived. Consequently, Turman's failure to perfect his appeal in strict accordance with the International constitution is a matter of no significance.

In sum, application of the precedent set forth in the above-described cases causes me to find that the 10(b) period began to run in the instant case on September 30, 1980. The record reveals the charges in Cases 16-CB-1758 and 16-CB-1759 were filed 8 days later on October 8, 1980. I find the charges were not time-barred by Section 10(b) of the Act.

With respect to the merits of the case, Local 714 contends I am precluded from finding that it violated Section 8(b)(1)(A) of the Act by fining Turman because the General Counsel has failed to show that the Union engaged in unlawful picketing at the Texas Instruments site. I find the defense to be without merit. Thus, while it

does appear that Local 714's picketing at the site in question was conducted in accordance with the criteria set forth in *Moore Dry Dock*,⁸ adherence to such criteria does not entitle a union to impose discipline upon a member working for a secondary employer at a common situs where an employer other than his own is being subjected to primary picketing. See *Local Union No. 153, International Brotherhood of Electrical Workers (Belleville Electric & Heating, Inc.)*, 221 NLRB 345, 353 (1975), and *Carpenters and Joiners of America, Local 1620 (David M. Fisher Construction Company)*, 208 NLRB 94 (1974). Here, the record reveals that Local 714 had a primary dispute with B & J and had no dispute with Turman's employer, Contractors Foundation. Further, it is clear that Turman entered and left the site through a gate reserved for neutrals which was not being picketed by Local 714 on April 16, 1979. In the circumstances described, Local 714 could not lawfully encourage Turman to cease performing work for Contractors Foundation, a neutral employer, nor could it lawfully fine him because he continued to work for his employer while Local 714 picketed B & J at the site. I find that by fining Turman \$500 on September 11, 1979, Local 714 violated Section 8(b)(1)(A) as alleged.

Respondent International Union attempts to avoid a finding that it violated Section 8(b)(1)(A) by affirming Local 714's action by contending the International Union and Local 714 are independent entities and by observing that it took no part in the activities which caused Local 714 to impose the fine upon Turman. I find the defense to be without merit. Inspection of Respondent International's Exhibit 1, which consists of the entire file considered by the general executive board of the International, clearly reveals that Turman advised the International Union that he entered the Texas Instruments jobsite on April 16, 1979, through the McKee gate which was not picketed and that he thereafter performed work on the site for an employer with whom Local 714 had no dispute; i.e., Contractors Foundation.⁹ Patently, the International Union was obligated to sustain Turman's appeal if the facts in its possession revealed Local 714 had acted unlawfully. I find that the facts presented to the general executive board revealed that Local 714 acted unlawfully when it imposed the fine under discussion on Turman and the International Union's affirmation of Local 714's action constituted violation of Section 8(b)(1)(A) of the Act as alleged. See *International Brotherhood of Electrical Workers, AFL-CIO, and Local 134, International Brotherhood of Electrical Workers, AFL-CIO (Illinois Bell Telephone Company)*, 192 NLRB 85, 86, fn. 6 (1971).

CONCLUSIONS OF LAW

1. Contractors Foundation Drilling Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondents are labor organizations within the meaning of Section 2(5) of the Act.

⁷ See also *Communications Workers of America, Local 9511 (Pacific Telephone and Telegraph Company)*, 188 NLRB 433, 435 (1971).

⁸ *Sailor's Union of the Pacific, AFL (Moore Dry Dock Company)*, 92 NLRB 547 (1950).

⁹ See Resp. Intl. Exh. 1(a), pp. 1-3 and 7.

3. By fining Leonard G. Turman, a member of its sister Local, Local 819, International Union of Operating Engineers, for working behind a Local 714 picket line for a neutral employer at a common situs, Local 714 engaged in an unfair labor practice affecting commerce within the meaning of Section 8(b)(1)(A) of the Act.

4. Respondent International, insofar as it, acting through its officers, affirmed the fine described in the preceding Conclusion of Law, violated Section 8(b)(1)(A) of the Act.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, it will be recommended that they shall jointly be required to rescind the \$500 fine levied against Leonard G. Turman on September 11, 1979, and expunge all records thereof, and notify Local 819 of such action. I shall further recommend the posting of a notice signed by officers of both Respondents.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁰

The Respondents, International Union of Operating Engineers, and its affiliated Local 714, Dallas, Texas, their respective officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Fining, or affirming the fine of, member employees for working behind a Local 714 picket line for neutral employers at a common situs construction site.

¹⁰ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Rescind and expunge from the records the \$500 fine levied against Leonard G. Turman for working behind a Local 714 picket line for a neutral employer and notify Local 819 of such action.

(b) Post at its business offices, meeting halls, and all other places where notices to members of the Local are customarily posted, copies of the attached notice marked "Appendix."¹¹ Copies of said notice, on forms provided by the Regional Director for Region 16, after being duly signed by representatives of Respondents, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondents to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Furnish the Regional Director for Region 16 signed copies of said notice for posting by Contractors Foundation Drilling Company, if willing, in places where notices to employees are customarily posted. Copies of said notices, on forms provided by the Regional Director, shall, after being signed by Respondents, be forthwith returned to the Regional Director for disposition by him.

(d) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

¹¹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."